APR 20 1979
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1453

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

HARVEY F. EUGE, RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION

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April, 1979

INDEX

	Page
Opinions below	4
Additional Statutes involved	4
Statement of the case	5
Reasons for denying the petition	6
Conclusion	10
Appendix 1	1a
Appendix 2	2a
Appendix 3	3a

CITATIONS

Cases:

Reisman v. Caplin, 375 U.S. 440 (1964)	9
United States v. Brown, 536 F.2d 117 (6th Cir. 1976)	5,8,9
United States v. Campbell, 524 F.2d 604 (8th Cir. 1975)	6,7,8
United States v. Davey, 543 F.2d 996 (2d Cir. 1976)	5,8
United States v. LaSalle National Bank, 437 U.S. 298 (1978)	7
United States v. Rosinsky, 547 F.2d 247 (4th Cir. 1977)	6,8,9

Statutes and Legislative History:

Internal Revenue Code of 1954:

Section 7402(b)	4,8,3a
Section 7602	4,5,6,7,8,3a
Section 7604	4,5,9,3a,4a

Internal Revenue Code of 1939:

Section 3614	4,7,4a
Section 3615	4,7,5a
Section 3633	4,8,5a
Section 3654	7

H.R.Rep. No. 1337, 83d Cong., 2d Sess., A436 (1954)	7
S.Rep. No. 1622, 83d Cong., 2d Sess., 617 (1954)	7

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NO. 78-1453

UNITED STATES OF AMERICA, ET AL., PETITIONERS

V.

HARVEY F. EUGE, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR

THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Harvey F. Euge requests this Court to deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The order of the district court is not reported (App. A to Petition, pp. 1a-3a). Additional orders of the district court on February 6, 1978 and February 8, 1978 are contained in App. 1 and App. 2, infra, pp. 1a-2a. The opinion of the court of appeals is reported at 587 F.2d 25 (App. B to Petition, pp. 4a-9a).

ADDITIONAL STATUTES INVOLVED

The pertinent provisions of Sections 7402, 7602 and 7604 of the Internal Revenue Code of 1954, and Sections 3614, 3615 and 3633 of the Internal Revenue Code of 1939 are set forth in Appendix 3, infra, pp. 3a-5a.

STATEMENT OF THE CASE

In addition to the statement contained in the Petition, respondent believes the following additional facts are relevant. After being served with the Order to Show Cause, respondent failed to appear for the hearing initially set for February 6, 1978. The District Court entered an Order of Attachment for Arrest on February 6, 1978 App. 1, infra, p. 1a. Respondent was taken into custody on February 8, 1978, and brought before the Court. At respondent's request, counsel was appointed to represent him in this matter. Respondent was subsequently released and ordered to appear with counsel at the hearing on the Order to Show Cause App. 2, infra, p. 2a.

On April 13, 1978, the district court ordered respondent to execute handwriting exemplars in compliance with an Internal Revenue Service administrative summons. The court of appeals reversed. In its opinion, the court noted that the "question of whether §7602 authorizes the IRS to require a taxpayer to create a document by giving handwriting exemplars as contrasted to the question of whether the Service can compel the taxpayer to produce for examination an existing piece of writing or document has not been free from doubt...." (App. B to Petition, p. 8a) (emphasis supplied). The majority went on to note that the Sixth Circuit, in United States v. Brown, 536 F. 2d 117 (6th Cir. 1976), and the Second Circuit, in United States v. Davey 543 F.2d 996 (2d Cir. 1976), have both concluded that Section 7602 does not authorize the production of documents not yet in existence.

The majority below stated that the view expressed in the dissenting opinion in United States v. Campbell, 524 F.2d 604 (8th Cir. 1975) should be followed. Contrary to the assertion in the Petition, at pp. 5 and 10, the dissenting opinion in Campbell rests upon statutory construction, rather than upon a view that the compulsion of handwriting exemplars violates the "search and seizure" clause of the Fourth Amendment. This is made clear by the statement that "If the Internal Revenue Service desires the right to require individual taxpayers to give handwriting exemplars, they should go to Congress and ask for this authority." 524 F.2d at 609 (dissenting opinion).

Likewise, the majority in this case in the Eighth Circuit clearly based its opinion upon an interpretation of the statute, rather than upon constitutional grounds. As stated in footnote 3 to the opinion, "Our holding is limited to the precise question before us, namely, whether or not the IRS has the authority under the statute here involved to compel a taxpayer to create out of thin air handwriting exemplars by using his brain, eyes and hand." (App. B to Petition, p. 9a) (emphasis supplied).

REASONS FOR DENYING THE PETITION

The decision of the court of appeals conflicts with that of the Fourth Circuit in United States v. Rosinsky, 547 F.2d 249 (4th Cir. 1977). However, the Rosinsky opinion is unsupported by the text or history of Section 7602 and conflicts with prior decisions of this Court. The court below fully considered and correctly decided the issue of statorory interpretation presented here.

1. The court of appeals' ruling that the Internal Revenue Service does not have the power to compel a person to create documents not yet in existence, including handwriting exemplars, is rooted in the statutory text, the legislative history of the Internal Revenue Code of 1954 and the historical development of the summons power.

In this Court's most recent opinion on the subject of Internal Revenue summonses, United States v. LaSalle National Bank, 437 U.S. 298 (1978), it was noted that "Section 7602 derives, assertedly without change in meaning, from corresponding and similar provisions in §§3614, 3615 and 3654 of the 1939 Code." Id. at 310.[1] In fact, the legislative history of Section 7602 explicitly states that the statute "contains no material change from prior law." H. R. Rep. No. 1337, 83d Cong. 2d Sess., A436 (1954); S. Rep. No. 1622, 83d Cong. 2d Sess., 617 (1954). The predecessors to Section 7602 conferred upon the Internal Revenue Service the power to compel the production of "books, papers, records, or memoranda." Sections 3614 and 3615, Internal Revenue Code of 1939 (App. 3, infra, pp. 4a-5a). These provisions clearly contemplate the production of items which already existed in a tangible form at the time the summons was issued. See, United States v. Campbell, supra at 606.

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[1]The "assertion" was made by the government in LaSalle. See Petitioner's Brief on the Merits, pp. 20 -29, where the government, after an exhaustive review of the history of the summons power, concluded that Section 7602 remained unchanged in meaning from preceding statutes. The Court relied heavily upon the historical antecedents of Section 7602 in concluding that Congress intended to permit administrative investigations of tax fraud with interrelated criminal and civil elements. Id. at 310-311 & nn. 13-14.

Furthermore, Section 3633 of the 1939 Code conferred jurisdiction upon the district court to enforce a summons for "books, papers, or other data." This section was brought forward into the 1954 Code unchanged as Section 7402 (b). (App. 3, infra, p. 3a) The key phrase, "other data", whose meaning was much disputed in this case, as well as in Campbell and Brown, thus is found in the law as it existed prior to 1954. Since the scope of the district court's jurisdiction to enforce a summons could not exceed the Commissioner's power to issue it, clearly the phrase "other data" as it was used in the 1939 Code referred only to tangible, existing items. The legislative history of Section 7602, which makes a direct reference to prior law, indicates that this same interpretation was to be carried forward in the new statute. Thus, Congress was not without a point of reference in stating that Section 7602 worked no "material" change in prior law.

By its decision below, the Eighth Circuit has joined the Second and Sixth Circuits in holding that an Internal Revenue administrative summons cannot be used to compel the creation of documents, including handwriting exemplars. United States v. Davey, supra at 1000; United States v. Brown, supra, at 121, 123.

2. In United States v. Rosinsky, 547 F.2d 249 (4th Cir. 1977), the court of appeals held that the power to compel a person to "appear" carries with it the inherent power to compel the doing of certain non-testimonial acts, such as executing handwriting exemplars.[2] However, this reading of

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[2]In dictum, the Fourth Circuit indicated its agreement with the majority's interpretation of the phrase "other data" in Campbell. United States v. Rosinsky, 547 F.2d at 253 n.3. However, it preferred to rest its decision upon a construction of the word "appear". The Eighth Circuit rejected both arguments in the opinion below.

the statute appears to conflict with the Court's opinion in Reisman v. Caplin, 375 U. S. 440 (1964). In Reisman this Court ruled that the body attachment procedures contained in Section 7604 (b) applied only to the situation where the person summoned "wholly made default or contumaciously refused to comply." Id. at 448. Mere appearance before the proper officer satisfies the statutory requirements placed upon a person served with a summons. Thus, the "appearance" language of the statute is confined to just that -- the person must appear and either comply with the summons or interpose good faith defenses to it. Id. at 446-447. He cannot simply ignore the summons or he risks being taken into custody in order to compel a response.

A similar procedure is in fact what was followed in this case. Respondent failed to appear before the district court in response to the Order to Show Cause served upon him. Order of Attachment for Arrest (App. 1, infra, p. 1a). He was taken into custody and subsequently released after counsel was appointed to represent him and a date set for a hearing. Order (App. 2, infra, p. 2a).

The expansive interpretation of Section 7602 set forth in Rosinsky and urged by petitioners in the lower courts is unsupported by the legislative history of the statute. For example, in United States v. Brown , supra at 120, the government argued that "other data" included "any constitutionally permissible information". In its brief filed in the Eighth Circuit in this case, the government claimed that it could use the summons power not only to obtain handwriting and voice exemplars, but also to use other procedures common to criminal cases as fingerprinting, standing in a lineup, or

trying on clothes for the purpose of identification. Obviously, such a use of the summons power conferred by Section 7602 goes far beyond anything contemplated by the 1939 Code, and is a "material" change from prior law.

3. The decision below rested upon the question whether the Internal Revenue Service had the statutory authority to compel the creation of documents which did not previously exist (App. B to Petition, p. 9a, note 3). The Eighth Circuit correctly held that Congress did not grant this power to the Internal Revenue Service. If the power to compel the creation of documents is truly essential to tax investigations, it should be specifically granted by Congress with appropriate restrictions.

CONCLUSION

For the foregoing reasons, Respondent requests this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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April, 1979

APPENDIX 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION
No. 78-MISC-0004-C

UNITED STATES OF AMERICA and PATRICK J. FINNESSEY,
Special Agent Of The Internal Revenue Service, PETITIONERS
v.
HARVEY F. EUGE, RESPONDENT

ORDER OF ATTACHMENT FOR ARREST

Whereas, it appears that Harvey F. Euge, on the 13th day of January, 1978, was personally served with an Order to Show Cause to appear before this Court and that the said Harvey F. Euge willfully failed and refused to appear before this Court on February 6, 1978, to show cause why he should not be compelled to obey the Internal Revenue Service summons issued to him on October 7, 1977.

IT IS ORDERED that a Writ of Attachment be forthwith issued, commanding the Marshal of this court and his deputies, to attach the said Harvey F. Euge, and have his body before this Court at 1114 Market Street, St. Louis, Missouri, forthwith, to proceed to a hearing of the above case. A copy of this Order shall be served upon the said Harvey F. Euge at the time he is apprehended.

/s/ H. Kenneth Wangelin
H. KENNETH WANGELIN
United States District Judge

Dated this 6th day of
February, 1978

APPENDIX 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION
UNITED STATES OF AMERICA and PATRICK J. FINNESSEY,
Special Agent Of The Internal Revenue Service, PETITIONERS
v.
HARVEY F. EUGE, RESPONDENT

O R D E R

Now on this date appeared the United States Attorney and respondent Harvey F. Euge, who was in the custody of agents of the Intelligence Division, Internal Revenue Service, pursuant to this Court's Order of Attachment for Arrest of respondent for failure to appear on February 6, 1978, as required in the Court's Order to Show Cause heretofore entered. Now therefore,

IT IS ORDERED that the Order and return of attachment for arrest are dissolved, and the respondent Harvey F. Euge is released from custody; the Order to Show Cause is continued to February 13, 1978, at 10:00 A.M., at which time the respondent is ordered to appear and make his return, together with counsel appointed for him in this matter.

/s/ H. Kenneth Wangelin
H. KENNETH WANGELIN
United States District Judge

Dated this 8th day of
February, 1978

APPENDIX 3

Internal Revenue Code of 1954, Title 26, United States Code:

§7402. JURISDICTION OF DISTRICT COURTS

(b) To enforce summons. If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

§7602. EXAMINATION OF BOOKS AND WITNESSES

For the purpose of ascertaining the correctness of any return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized--

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

§7604. ENFORCEMENT OF SUMMONS

(a) Jurisdiction of district court--If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records or other data.

(b) Enforcement--Whenever any person summoned under section * * * 7602 neglects or refuses to obey such summons, or to produce books, papers, records or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

Internal Revenue Code of 1939:

§3614. EXAMINATION OF BOOKS AND WITNESSES

(a) To determine liability of the taxpayer. The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.

(b) To determine liability of transferee. The Commissioner, for the purpose of determining the liability at law or in equity of a transferee of the property of any person with respect to any Federal taxes imposed upon such person, is hereby authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon such liability, and may require the attendance of the transferor or transferee, or of any officer or employee of such person, having knowledge in the premises, and may take his testimony with reference to the matter, with power to administer oaths to such person or persons.

§3615. SUMMONS FROM COLLECTOR TO PRODUCE BOOKS AND GIVE TESTIMONY

(a) General authority. It shall be lawful for the collector, subject to the provisions of this section to summon any person to appear before him and produce books at a time and place named in the summons, and to give testimony or answer interrogatories, under oath, respecting any objects or income liable to tax or the returns thereof. The collector may summon any person residing or found within the State or Territory in which his district lies; and when the person intended to be summoned does not reside and can not be found within such State or Territory he may enter any collection district where such person may be found and there make the examination herein authorized.

And to this end he may there exercise all the authority which he might lawfully exercise in the district for which he was commissioned.

* * *

(e) Enforcement. Whenever any person summoned under this section neglects or refuses to obey such summons, or give testimony, or to answer interrogatories as required, the collector may apply to the judge of the district court or to a United States Commissioner for the district within which the person so summoned resides for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

3633. JURISDICTION OF DISTRICT COURTS

(a) To enforce summons. If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.